IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 7328 of 2006
with
CRIMINAL MISC.APPLICATION No. 7336 of 2006
with
CRIMINAL MISC.APPLICATION No. 7846 of 2006
with
CRIMINAL MISC.APPLICATION NO. 7605 OF 2006
WITH
CRIMINAL MISC.APPLICATION NO. 7329 OF 2006
WITH
CRIMINAL MISC.APPLICATION NO.7331 OF 2006
WITH
CRIMINAL MISC.APPLICATION NO. 7333 OF 2006
WITH
CRIMINAL MISC.APPLICATION NO. 14205 OF 2006
WITH
CRIMINAL MISC.APPLICATION NO. 4195 OF 2006
WITH
CRIMINAL MISC.APPLICATION NO. 4566 OF 2006
WITH
CRIMINAL MISC.APPLICATION NO. 4577 OF 2006
WITH
CRIMINAL MISC.APPLICATION NO. 4582 OF 2006

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DR. MANISH C. DAVE - Applicant(s)
Versus

THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR A.M Raval, Mr. M.B Gandhi, Mr Hemang Raval,Mr A.D. Oza, Mr Niklesh Shah for the Petitioners
Mr. I.M. Pandy Addl. PUBLIC PROSECUTOR for Respondent(s) : 1,
Ms Pinakin Raval,MS RV ACHARYA, Mr. N.K Mazumdar for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 07/02/2007

ORAL JUDGMENT

1. Common questions of fact and law arise in the above petitions and therefore they are disposed of by the present common judgement.

2. The petitioners have prayed to quash and set aside Criminal Complaint Numbers 1677/2006,1558/05, 7210/05,6534/05, 6535/05, criminal case Nos, 4762/06, 42/06, 1707/06, 1216/06, 1136/06, 4656/06, 1689/06 pending before the Metropolitan Magistrate, Court No.15, Ahmedabad.

3. The petitioners are Radiologists possessing requisite qualification and doing practice in Ahmedabad. The petitioners, for the purpose of diagnosis, use Sonography machine in their premises. The competent authority carried out inspection at the respective places and allegedly found certain

irregularities. During the diagnosis the petitioners are required to fill up certain forms. The allegation in substance is that certain details were not provided in the proforma. The concerned authority has, therefore, filed complaints against the petitioners for the alleged commission of offences punishable under sections 4 and 5 of The Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The petitioners have challenged the aforesaid complaints on various grounds.

4. Learned Advocate for the petitioners submitted that as far as non-filling up of certain columns is concerned, the petitioners are not required to note the same as the petitioners have nothing to do with such particulars in view of the fact that ultimately the report which is indicated in the sonography report is just to be handed over to the patient concerned.

5. Learned Advocate further submitted that looking to the provisions of the Act, the petitioners have not committed any irregularity and the respondent authority even prima facie failed to establish that

the pregnant woman or her relative or any other person has been communicated the sex of foetus or there has been either sex determination or sex selection by the petitioners at any point of time. He, therefore, submitted that the complaint do not disclose any offence being committed by the petitioners even on prima facie basis and therefore they are required to be quashed and set aside.

6. Learned Advocate for the petitioners further submitted that the complaints are not maintainable inasmuch as the complaints have not been filed by the persons who are competent to file such complaints.

7. Learned Advocate for the respondent authorities opposed the petitions and submitted that the petitioners have failed to fill up the forms as required under the Act and therefore there is prima facie case against the petitioners and this Court may not interfere in the present petitions.

8. Having heard the rival contentions, the only question required to be considered is whether and the complaint is filed by the authorised person or not and the petitioners have prima facie committed any

offence under the Act as alleged in the aforesaid complaints or not.

9. The definition of “appropriate authority” Section 17(2) reads as under:

> “(2) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purpose of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.”

10. Section 28 of the Act pertains to Cognizance of offences, which reads as under:

> “28. Cognizance of offences – (1) No Court shall take cognizance of an offence under this act except on a complaint made by -
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> [a] the appropriate authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority; or
>
> [b] a person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the Court.”

Therefore the complaint should be filed by Appropriate authority or any officer authorised in this behalf by the Central Government or State Government and the person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the Court. Admittedly, the complaints were not filed by Appropriate Authority or any officer authorised in this behalf. There is nothing on record to show that the persons who have filed the complaints have given notice as per section 28(b) of the Act. In view of these facts I am of the view that the complaints become bad in law.

11. As far as the complaints are concerned, section 4 of the Act is required to be noted, which reads as under:

> “4. Regulation of pre-natal diagnostic techniques – On and from the commencement of this Act –
>
> (1) no place including a registered Geneting Counseling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purpose specified in Cl.(2) and after satisfying any

of the conditions specified in Cl.(3).

(2) no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities namely:-

[i] chromosomal abnormalities;
[ii] genetic metabolic diseases;
[iii] haemoglobinopathies;
[iv] sex-linked genetic diseases
[v] congenital anomalies;
[vi] any other abnormalities or diseases as may be specified by the Central Supervisory Board.

(3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled, namely:-

[i] age of the pregnant woman is above thirty-five years;
[ii] the pregnant woman has undergone two or more spontaneous abortions or foetal loss;
[iii] the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
[iv] the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease;

[v] any other condition as may be specified by the Board.

PROVIDED THAT the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of Sec.5 or Sec.6 unless contrary is proved by the person conducting such ultra sonography;

> (4) no person including a relative or husband or the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purposes specified in Cl.(2).
>
> (5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sex selection technique on her or him or both."

12. According to the aforesaid proviso to subsection (3) of section 4, the Act and the relevant rules the petitioners are required to fill in Form F. The criminal complaints are based on the alleged infirmities found in filling up Form-F. Therefore, this court is required to consider whether, by the so-called alleged infirmities, any offence has been committed by the petitioners. The language of the proviso is to the effect that "any deficiency or inaccuracy" found therein shall amount to contravention of the provisions of Sec.5 or Sec.6 unless contrary is proved by the person conducting such ultrasonography. The phrase "unless contrary is proved by the person conducting such ultrasonography" connotes that if there is any allegation the person conducting can prove otherwise. In the present case, there is no allegation by the respondent authority that provisions of sections 5 and 6 of the Act are

attracted and hence there is no question of proving otherwise.

13. Further, if the alleged infirmities are proved, then it would amount to contravention of the provisions of section 5 or section 6 of the Act. The said sections read as under:

> "5. Written consent of pregnant woman and prohibition of communicating the sex of foetus – (1) No person referred to Cl.(2) of Sec.3 shall conduct the pre-natal diagnostic procedures unless –
>
> [a] he has explained all known side and after effects of such procedures to the pregnant woman concerned;
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> [b] he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and
>
> [c] a copy of her written consent obtained under Cl(b) is given to the pregnant woman.
>
> (2) No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs, or in any other manner.
>
> 6. Determination of sex prohibited – On and from the commencement of this Act –
>
> [a] no Genetic Counseling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre,Laboratory or Clinic, prenatal

> diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;
>
> [b] no person shall conduct or cause to be conducted any prenatal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.
>
> [c] no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception."

14. A reading of the aforesaid provisions would show that no person should be communicated the sex of foetus, the test should not be conducted for the purpose of determining the sex of a foetus nor can there be a test for selection of sex before conception. If the test is done for the aforesaid purpose there is a contravention of the provisions of the Act.

15. From a bare perusal of the complaints it is apparent that it is not the case of the authority that provisions of section 5 or 6 are applicable in as much as the authority has not been able to show or even alleged that (i) any pregnant woman or her relative or any other person has been communicated the sex of foetus by the petitioners or (ii) at any place and by any person, including the person conducting

ultrasonography, there has been either sex determination or sex selection. In absence of such specific allegations in the complaint it cannot be said that provisions of sections 5 and 6 of the Act would be attracted.

16. Reading the proviso to section (3) it is to be presumed that the deficiency or inaccuracy in the record would amount to contraventions of the provisions of Section 5 or section 6 of the Act. As a natural consequence, in view of such deficiency or inaccuracy, there should be allegation of contravention of provisions of 5 and 6 of the said Act. In the present case there are no specific allegations in the complaint pertaining to the provisions of section 5 and 6. Apart from that the language of sections 5 and 6 is prohibitory in nature and therefore the burden of proof will be on the authority to prove that there was contravention and thereupon to rely on the provisions of Statutory Form-F for filing criminal complaint.

17. In the present case, without alleging the contravention to provisions of section 5 and 6, the complaint has been filed merely on the alleged

deficiency or inaccuracy. In short, when there is an allegation of the alleged deficiency or inaccuracy, it should follow contravention of provisions of sections 5 and 6. Such is not the case in the complaints in question.

18. As far as section 4(3) is concerned, it is the case of the petitioners that the register is maintained with all the columns which fall within the four corners of the duties and functions of the petitioners. Apart from that no opportunity is afforded to the petitioners to prove contrary and put up their case. Further, such deficiency or inaccuracy, at least so far as the present proceedings are concerned, is merely a procedural lapse, which do not in any manner contravene the provisions of sections 5 and 6 of the Act.

19. In view of the above, when it is not established that there is contravention of the provisions of section 5 or 6, the contention regarding any inaccuracy or deficiency in Form-F will not be applicable and therefore the complaints themselves are not maintainable. I am therefore of the view that the complaints do not prima facie establish any alleged

offence against the petitioners.

19. In the premises aforesaid, the Criminal Cases No.1558/05, 7210/05,6534/05, 6535/05, criminal case Nos 4762/06, 42/06, 1707/06, 1216/06, 1136/06, 4656/06, 1689/06, 1677/06 pending in the court of Metropolitan Magistrate, Ahmedabad, are hereby quashed and set aside. Rule is made absolute accordingly.

(K.S.Jhaveri,J)

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